BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD OF THE STATE OF CALIFORNIA

AB-8361
File: 47-350965 Reg: 04056646

INLAND PACIFIC INVESTMENTS, LLC dba Carlos O'Briens
440 West Court Street, San Bernardino, CA 92401,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: John P. McCarthy

Appeals Board Hearing: September 1, 2005
Los Angeles, CA

ISSUED: NOVEMBER 7, 2005

Inland Pacific Investments, LLC, doing business as Carlos O'Briens (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which suspended its license for 10 days, and indefinitely thereafter until certain conditions are satisfied, for violations of Business and Professions Code sections 23804, 23038, and 23396.[2]

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[1]The decision of the Department, dated November 4, 2004, is set forth in the appendix.

[2] Section 23804 provides:

> A violation of a condition placed upon a license pursuant to this article shall constitute the exercising of a privilege or the performing of an act for which a license is required without the authority thereof and shall be grounds for the suspension or revocation of such license.

Section 23038 provides:

> 'Bona fide public eating place' means a place which is regularly and in a bona fide manner used and kept open for the serving of meals to guests for

(continued...)

Appearances on appeal include appellant Inland Pacific Investments, LLC, appearing through its counsel, Joshua Kaplan, and the Department of Alcoholic Beverage Control, appearing through its counsel, John W. Lewis.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale general bona fide public eating place license was issued on November 20, 2000. Thereafter, the Department instituted an accusation against appellant charging, in four counts, that appellant refused to produce certain records demanded by the Department (count 1); failed to maintain and make available to the Department upon demand records reflecting separately gross sales of food and gross sales of alcoholic beverages (count 2); knowingly submitted records known to be false (count 3); and sold alcoholic beverages other than beer at a time the premises was not licensed for such sales (count 4).

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[2](...continued)
compensation and which has suitable kitchen facilities connected therewith, containing conveniences for cooking an assortment of foods which may be required for ordinary meals, the kitchen of which must be kept in a sanitary condition with the proper amount of refrigeration for keeping of food on said premises and must comply with all the regulations of the local department of health. 'Meals' means the usual assortment of foods commonly ordered at various hours of the day; the service of such food and victuals only as sandwiches or salads shall not be deemed a compliance with this requirement. 'Guests' shall mean persons who, during the hours when meals are regularly served therein, come to a bona fide public eating place for the purpose of obtaining, and actually order and obtain at such time, in good faith, a meal therein. Nothing in this section, however, shall be construed to require that any food be sold or purchased with any beverage.

Section 23396 provides:

Any on-sale license authorizes the sale of the alcoholic beverage specified in the license for consumption on the premises where sold. No alcoholic beverages, other than beers, may be sold or served in any bona fide public eating place for which an on-sale license has been issued unless the premises comply with the requirements specified in Section 23038, 23038.1, or 24045.1.

An administrative hearing was held on August 27, 2004, at which time oral and documentary evidence was received. Subsequent to the hearing, the Department issued its decision which dismissed counts 1[3] and 3, sustained the charges of counts 2 and 4, and ordered the suspension from which this appeal has been taken. Appellant's license was suspended for 10 days, and indefinitely thereafter until appellant petitions for a conditional license allowing alcohol sales only between the hours of 11:00 a.m. and 11:00 p.m. daily, or exchanges its current license for a type 48 (on-sale general) license.[4]

Appellant has filed a timely notice of appeal. In its appeal, appellant contends that the decision is not supported by the findings, and the findings are not supported by substantial evidence. More specifically, appellant contends as to count 2 that the Department demanded records only for the period April 1, 2003 through June 30, 2003. Since the accusation alleges a failure to maintain such records for the period August 1, 2003 to January 28, 2004. appellant asserts, there is a fatal disparity between what the Department demanded and what the accusation alleged. Alternatively, appellant alleges that, in fact, it maintained and produced such records.

As to count 4, appellant alleges that at all times the premises was investigated, it

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[3] The ALJ expressed the view that, because of the lack of supporting information, the numbers in the documents produced in respect to the request were "highly suspect," and their veracity could not be determined. He concluded, nonetheless, that "the fact that the numbers are suspect does not translate into a failure to respond." (Conclusion of Law 6.)

[4] The Department's theory of the case is that appellant has operated as a night club rather than a bona fide eating place. The limitation on hours of operation would presumably discourage that in the future, and force greater reliance on food service. In the alternative, operation with a type 48 (on-sale general) license would permit operation as a night club, would not require food service, but would require that minors be excluded.

had an open and functioning kitchen with the means of preparing an assortment of foods and means for keeping them fresh, had a refrigerator, stove, cook, and buffet table for service of food.

We begin with the recognition that our role in this appeal is limited. The scope of the Appeals Board's review is limited by the California Constitution, by statute, and by case law. In reviewing the Department's decision, the Appeals Board may not exercise its independent judgment on the effect or weight of the evidence, but is to determine whether the findings of fact made by the Department are supported by substantial evidence in light of the whole record, and whether the Department's decision is supported by the findings. The Appeals Board is also authorized to determine whether the Department has proceeded in the manner required by law, proceeded in excess of its jurisdiction (or without jurisdiction), or improperly excluded relevant evidence at the evidentiary hearing.[5]

"Substantial evidence" is relevant evidence which reasonable minds would accept as a reasonable support for a conclusion. (*Universal Camera Corp. v. Labor Bd.* (1951) 340 U.S. 474, 477 [95 L.Ed. 456, 71 S.Ct. 456] and *Toyota Motor Sales U.S.A., Inc. v. Superior Court* (1990) 220 Cal.App.3d 864, 871 [269 Cal.Rptr. 647].) When, as in the instant matter, the findings are attacked on the ground that there is a lack of substantial evidence, the Appeals Board, after considering the entire record, must determine whether there is substantial evidence, even if contradicted, to reasonably support the findings in dispute. (*Bowers v. Bernards* (1984) 150 Cal.App.3d

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[5]The California Constitution, article XX, section 22; Business and Professions Code sections 23084 and 23085; and *Boreta Enterprises, Inc. v. Department of Alcoholic Beverage Control* (1970) 2 Cal.3d 85 [84 Cal.Rptr. 113].

870, 873-874 [197 Cal.Rptr. 925].)

Appellate review does not "resolve conflicts in the evidence, or between inferences reasonably deducible from the evidence." (*Brookhouser v. State of California* (1992) 10 Cal.App.4th 1665, 1678 [13 Cal.Rptr.2d 658].) Where there are conflicts in the evidence, the Appeals Board is bound to resolve them in favor of the Department's decision, and must accept all reasonable inferences which support the Department's findings. (*Kirby v. Alcoholic Bev. Control App. Bd.* (1972) 7 Cal.3d 433, 439 [102 Cal.Rptr. 857] (in which the positions of both the Department and the license-applicant were supported by substantial evidence); *Kruse v. Bank of America* (1988) 202 Cal.App.3d 38, 51 [248 Cal.Rptr. 271]; *Lacabanne Properties, Inc. v. Dept. of Alcoholic Bev. Control* (1968) 261 Cal.App.2d 181, 185 [67 Cal.Rptr. 734]; *Gore v. Harris* (1964) 29 Cal.App.2d 821, 826-827 [40 Cal.Rptr. 666].) With these principles in mind, we have concluded that we should reverse the decision of the Department as to count 2 of the accusation, affirm the decision as to count 4 of the accusation, and remand the matter to the Department for reconsideration of the penalty in light of our ruling. We are aware that the Department may well impose the same penalty upon remand, but believe that should be the Department's choice rather than ours.

DISCUSSION

I

Count 2, which charged a condition violation, recited condition 3 of the license[6],

[6] Condition 3 states:

> The quarterly gross sales of alcoholic beverages shall not exceed the gross sales of food during the same period. The licensee shall at all times maintain records which reflect separately the gross sale of food and the gross sale of

(continued...)

and alleged as follows:

> That in violation of the above-recited condition(s), respondent-licensee(s), by and through its agent(s), employee(s) or servant(s), exercised a privilege or performed an act for which a license is required without the authority thereof, in that: on August 1, 2003 and up to and including the date of this accusation, the licensee has not made available to the Department on demand separately maintained records of quarterly gross sales of alcoholic beverages and food, in violation of the Business and Professions Code Section 23804.

The administrative law judge (ALJ), noting that count 2 "could certainly have been more elegantly written," concluded (Conclusion of Law 8), based on Findings of Fact 5 through 16, that the condition had been violated. He explained:

> The evidence is essentially uncontroverted that Respondent did not maintain separate records of food sales, alcoholic beverages sales (or fees received as cover or door charges). Despite the documents that Respondent presented the Department on or about August 15, 2003, in response to its request to produce records, the data underlying what was produced does not exist in sufficient detail, if at all, to permit anyone to prove much of anything relative to the percentage of gross revenue produced from sale of alcoholic beverages versus the percentage of gross revenue resulting from the sale of food. The only thing the evidence establishes for certain is that the information contained in the first three pages of Exhibit 5 is not accurate.

We agree that count 2 could have been more elegantly written. As written, the count charges a violation of condition 3 for the alleged failure to produce documents upon demand.

We have found no evidence of any demand for documents for the period August 1, 2003 to the date of the accusation. The only demand for documents was that contained in the letter Department investigator Ackley delivered to Oscar Chavez on August 1, 2003. (Exhibit 3.) That letter related only to the period April 1, 2003, to June

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[6](...continued)
alcoholic beverages of the licensed business. Said records shall be kept no less frequently than on a quarterly basis and shall be made available to the Department upon demand.

30, 2003, and as to that period, the ALJ found that such documents, albeit of questionable nature, had been produced.

It appears that the ALJ concluded that license condition 3 was violated because the records required by that condition had not been maintained, and read count 2 to allege a violation of the condition by appellant's failure to maintain separately records of gross sales of alcoholic beverages and gross sales of food. Had that been the charge of the accusation, the evidence is indeed sufficient and substantial. However, we agree with appellant that "The Department simply cannot penalize appellant for failing to supply to the Department that which the Department never demanded." (App. Br., pages 4-5.) Count 2 alleges a failure to produce certain records, not a failure to maintain them.

No doubt had count 2 alleged a failure to maintain such records, a strong inference could be drawn that none were. The difference between what was alleged and what was proved is too great to overlook.

II

Relying on extensive findings of fact,[7] the ALJ concluded that appellant had failed to operate in compliance with section 23038. He wrote, in Conclusion of Law 10:

> First, the time period covered by count 4 is from July 25, 2003, through January 28, 2004. The days and hours of operation during that time period were Thursdays through Sundays from 9:00 p.m. until 2:00 a.m. and the only food service provided at the Licensed Premises during that time was the free nightly buffet. The only payment received by Respondent for the nightly buffet was a percentage of the door charge imposed upon all customers entering the bar, whether they made use of the buffet or not, allocated by Respondent for the

[7] The ALJ based his conclusions on Findings of Fact 17 through 33. We have set these findings out in an addendum to this decision to illustrate their extensive nature, as well as the effort of the ALJ in establishing the foundation for his proposed decision.

> buffet. It was, therefore, established that virtually no *sales* of food occurred despite the bookkeeping tricks employed by Respondent to show otherwise.
>
> Respondent's Licensed Premises sold non-beer alcoholic beverages after July 25, 2003, at times when it was not operating in compliance with Section 23038. It was established that the Licensed Premises were not "regularly and in a bona fide manner used and kept open for the serving of meals to guests for compensation." It was not established that guests came to the premises for the purpose of obtaining meals therein. No guests actually ordered meals at the Licensed Premises and no guests were served meals at the Licensed Premises. There was not any actual and/or substantial sale of food. It is almost impossible to comply with Section 23038 when the business hours are restricted to between 9:00 p.m. and 2:00 a.m. Respondent has operated this business almost solely as a nightclub.

Appellant challenges these conclusions, claiming that it had an operating kitchen equipped with necessary appliances and food, as well as the buffet table. It describes the investigator's testimony as based on early evening 30-minute visits during which he asked no questions. Appellant defends its right to substitute paper plates and plastic eating utensils for china and flatware, and claims that, in this case, the hours it was open - between 9:00 p.m. and 2:00 a.m. - are the hours when meals are regularly served.

There is ample support in the record for the Department's decision sustaining count 4, and the findings upon which it is based. The records appellant produced (Exhibit 5 and 5-A) appear to have been manufactured from whole cloth; its business hours (not opening until 9:00 p.m.) are inconsistent with a bona fide eating place operation; its promotional literature (Exhibit 7) holds itself out as a dance club, omitting any mention of food; its "weekly lineup" offers such non-food lures as several varieties of music, a "$500 sexy dance" contest, a "wet T-shirt" contest; it used imaginative accounting to create the illusion of food sales by carving out a portion from the admission fee; the creation of a buffet table featuring salad, chips and salsa (see

Exhibit 4-C) was a device to substitute for the meal service required by the statute.

The California Supreme Court observed long ago, in *Covert v. State Board of Equalization* (1946) 29 Cal.2d 125, 134-135 [173 P.2d 545]:

> It is true, of course, that a restaurant would not be bona fide if it were created or operated as a mere subterfuge in order to obtain the right to sell liquor. There must not only be equipment, supplies, and personnel appropriate to a restaurant, together with a real offer or holding out to sell food whenever the premises are open for business but there must also be actual and substantial sales of food.

The court ruled for the licensee, noting, in part, that while gross income from food was less than that from liquor, "it does not appear that the respective amounts were so disproportionate as to show that the sales of food constituted a mere subterfuge." *(Covert, supra*, 29 Cal.2d 125, 135.)

The evidence overwhelmingly supports the decision, and its very nature explains why the ALJ arrived at the penalty he proposed.

Although it would appear to this Board that the findings in count 4 alone would be sufficient justification for the penalty - one that effectively forces appellant to operate either as a restaurant, or as a bar where minors are not permitted, we think it appropriate to remand the case to the Department and let the Department tell us whether it agrees with our surmise. While the impact on its present mode of operation may be substantial, appellant has no basis to complain. We find nothing about the penalty to be so out of the mainstream as to constitute cruel and unusual punishment.

ORDER

The decision of the Department is reversed as to count 2 of the accusation and affirmed as to count 4 of the accusation, and the case is remanded to the Department

for reconsideration of the penalty in light of our comments herein.[8]

FRED ARMENDARIZ, CHAIRMAN
SOPHIE C. WONG, MEMBER
TINA FRANK, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

ADDENDUM FOLLOWS

[8] This final decision is filed in accordance with Business and Professions Code §23088 and shall become effective 30 days following the date of the filing of this final decision as provided by §23090.7 of said code.

Any party may, before this final decision becomes effective, apply to the appropriate district court of appeal, or the California Supreme Court, for a writ of review of this final decision in accordance with Business and Professions Code §23090 et seq.

ADDENDUM

FINDINGS OF FACT 17 THROUGH 33

17. Department Investigator Ackley visited Respondent's business during the course of the investigation that led to the within Accusation on July 25, 2003, August 1, 15, and 29, 2003.

18. On July 25, 2003, Ackley arrived at the Licensed Premises around 10:30 p.m. The business was open and was selling alcoholic beverages beyond beer. Ackley believed the business did not open until 9:00 or 9:30 p.m., but he did not actually know what time it opened that evening. During the approximately 30 minutes that Ackley spent at the Licensed Premises he observed one person in the kitchen and a small amount of food being prepared. There were about 100 persons inside the Licensed Premises and upon entry patrons were both charged a fee for entry and patted down for weapons. No one was observed eating food and no buffet table or line was seen, including on the second floor/mezzanine area.

19. Late in July 2003, either shortly before or shortly after his July 25, 2003 visit to the Licensed Premises, Investigator Ackley and Oscar Chavez discussed Ackley's concern over the nature of the business operation at the Licensed Premises. Ackley expressed concern that the business was running as a nightclub and not as a restaurant and was not in compliance with conditions endorsed on its [license]. Ackley advised Oscar Chavez that an investigation was commencing. At that point, Oscar Chavez told Ackley that the business was not in compliance and there was no way it could be in compliance.

20. On August 1, 2003, in addition to delivering the Exhibit 3 request for records to Oscar Chavez at the Licensed Premises, Ackley again inspected the kitchen. He arrived at the Licensed Premises around 11:10 p.m. and found no one in the kitchen, but there was evidence that some food was being prepared. Oscar Chavez made a special point of showing Ackley to a second floor or mezzanine area where a small buffet table was set up with a limited amount of food available, along with paper plates, napkins and plastic utensils. One person was observed to be eating food. Ackley took photographs of the kitchen (Exhibit 4-A) and the buffet (Exhibit 4-C). Exhibit 4-B shows china Ackley located in a basement office space. He saw no china anywhere else in the Licensed Premises on any of his visits. Distilled spirits were sold on August 1.

21. During the August 1 visit to the Licensed Premises, Oscar Chavez told Ackley that he believed he had solved the problem of non-compliance with the 50-50 food condition (condition 3 on Exhibit 2). The solution he mentioned was to earmark a portion of the door charge as payment for the food buffet. Oscar Chavez said that of the $12 door charge, $10 would be allocated to food sales. Ackley did not see that day any sign at or near the front entrance indicating that some of the door charge was to be allocated for food, although on later visits such a sign was noted.

22. While it was not established exactly when, in July or August 2003, the food buffet

was first offered at Respondent's Licensed Premises, a preponderance of the credible evidence did establish that no food buffet was being offered during April, May or June 2003.

23. Ackley visited Respondent's Licensed Premises again on Friday, August 15, 2003. The time of his visit was approximately 8:30 p.m. He found the business closed, and did not wait around for it [to] open.

24. Ackley returned to the Licensed Premises on August 29, 2003, at about 11:30 p.m. He recalled the door charge that evening being $12. This was the first time Ackley became aware that a portion of the door charge was being attributed to sale of food for each patron. Once more, alcoholic beverages of a non-beer nature were being sold/served. On this visit the kitchen appeared to be open and operating, much the same as on Ackley's prior visits. The buffet was again available on the mezzanine, with approximately the same selection of food as he had seen before.

25. Ackley noticed that the door charge to enter the Licensed Premises seemed to vary from night to night. It appeared as low as $5 and as high as $15 and he speculated that the variance was due to differences in the cut taken by various promoters.

26. Oscar Chavez and a bookkeeper whose name was Daniel Solis [Solis] visited Ackley at the Department offices in Riverside in early October 2003, after Ackley had had an opportunity to review Exhibits 5, 5-A and 6 and after Ackley had had an opportunity to interview Gastelum. Solis was identified by Chavez as the bookkeeper for all Respondent's enterprises. Solis did not speak much English. Chavez translated for him as required.

27. When Ackley confronted Oscar Chavez and Solis about the source of Exhibit 5-A, they admitted that the documents had been prepared by respondent and taken to Gastelum for signatures. Ackley inquired about the discrepancy between what Chavez had told him in July about the prospects of compliance with the 50-50 condition and the numbers reflected in the first three pages of Exhibit 5 that showed almost exact compliance. Oscar Chavez and Solis, with Oscar Chavez interpreting, told Ackley that when the dollar sales for food did not equal or exceed the alcoholic beverage sales, they would "float" dollars from the door charge into the food sales column to make sure compliance resulted. [Fn. omitted.]

28. Oscar Chavez testified at the hearing. He was not very forthcoming and had a striking inability or unwillingness to place events in time. Oscar Chavez testified that while he used to be a member of Respondent's Limited Liability Company, to the extent of a 1% interest, he no longer has an ownership interest. He testified that he used to be the General Manager of Carlos O'Brien's, and now just helps his brother to run the business. He still considers himself to be a manager. Oscar Chavez identified Francisco Chavez as his older brother.

29. Oscar Chavez testified to the following facts, among others:

a. He did not recall telling Ackley in July 2003 that Carlos O'Brien's was not and could not be in compliance with the 50-50 food-alcoholic beverage condition.

b. Carlos O'Brien's had a food buffet set up for service on July 25, 2003.

c. The Licensed Premises had a full restaurant operation from 9:00 a.m. until 8:00 p.m. until 8 months ago (meaning until late January 2004) or the end of the year 2003. Only then did the businesses' [sic] hours reduce to between 9:00 p.m. and 2:00 a.m.[5]

[5] In an entirely different matter, Registration No. 02054095, heard by ALJ McCarthy on June 3, 2003, then premises manager Oscar Chavez credibly testified that Carlos O'Brien's was only open Thursdays through Sundays and normally only from 9:00 p.m. until 2:00 a.m. They spend a great deal of money advertising. Running a successful business in downtown San Bernardino is very difficult. He said that if the business were to suffer a suspension, it might put him out of business.

d. It is not true that Carlos O'Brien's did not open for business until before 9:00 p.m. for the first 8 months of 2004.

e. Oscar Chavez denied that he or Solis told Ackley that they floated money from the door charge to food to show compliance with the food condition.

f. Oscar Chavez denied implementing the food charge as part of the cover charge in August 2003, saying it has always been that way.

g. He waffled about whether during the second quarter 2003 food purchases were made from places other than San Miguel Meat Market. First he named U.S. Food Service as a possible supplier. Then he said there was no other. No documents from a second food vendor were ever provided to the Department.

As a result of the inconsistent and evasive testimony provided by Oscar Chavez, little credit was given to most of his assertions.

30. Oscar Chavez testified that Carlos O'Brien's had a full menu at one time, then they changed to seafood and that did not work. Now they are considering opening a deli. At present (the time of the hearing), however, they are only open from 9:00 p.m. until 2:00 a.m. He couldn't recall the hours of operation in August 2003.

31. Oscar Chavez confirmed that everyone is charged for food at the door. Out of a $10 cover charge, Respondent allocates $2 for cover and $8 for the buffet regardless whether the person eats or not. He testified that if someone complains about it and says they don't want food, they would be permitted entry for just $2, but no one has asked about that yet, despite three signs being posted about the food allocation.

32. Respondent does not keep a record of each patron food purchase. That is

because it offers a buffet and there is no food purchased separately by any patron except as an arbitrary allocation of some portion of the door charge. Food is available on the mezzanine and outside the door to the kitchen. The kitchen is always open to the patrons. Since the buffet began, there has been no menu available.

33. According to Oscar Chavez, Respondent runs the events at the Licensed Premises on Fridays and Saturdays. The other days, Wednesdays (if open), Thursdays and Sundays are run by outside promoters. Exhibit 7 is an example of advertising for the events that take place at the Licensed Premises. It advertises the various types of music programs available by day of the week, promotes drink specials, notes that one must only be 18 years of age to enter, entrance is "FREE B-4 10:00 [p.m.]," but nowhere mentions food service. Despite all that, and admitting that there is no menu available, Oscar Chavez testified that "[w]e have a full assortment of Mexican food."